* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 12994-95/2004

Reserved on : February 02,2007
Decided on : July 2, 2007

M/S. EVEREST SANITATION (INDIA) & ANR. ..... Petitioners
Through Mr. Sanjay Sherawat, Advocate

versus

DELHI JAL BOARD & ORS. ..... Respondents
Through : Mr. Sandeep Aggarwal, Advocate for the DJB.
Mr. R.K. Tripathi, Advocate for respondent No.3.
Mr. Sunil Bagai, Advocate for respondent No.4.
Mr. Kartike Anand, Advocate for Intervenors.

CORAM:
Mr. Justice S. Ravindra Bhat

1. Whether reporters of local papers may be allowed to see the judgment.? yes
2. To be referred to the Reporter or not? yes
3. Whether the judgment should be reported in the Digest? yes

Mr. Justice S. Ravindra Bhat:

1. In these writ proceedings under Article 226 of the Constitution of India, a condition has been imposed by the respondent, Delhi Jal Board(hereafter referred to as "DJB") through a circular, requiring testing of water meters before their procurement has been impugned.

2. The petitioners claim to be engaged in the business of manufacturing water meters (domestic type). They also claim to hold valid licences for use of ISI Standard Mark, issued by the Indian Standards Institution, by virtue of the Indian Standards

Institution (Certification Marks) Act, 1952. It is averred that the use of ISI Standard Mark is governed by the provisions of Bureau of Indian Standards Act, 1986 (hereafter referred to as "BIS") Act as well as the Rules and Regulations framed under that Act. The BIS has spelt out standards applicable to the domestic water meters, which have to be adhered to by the manufacturers, to qualify the use of such mark. The specifications are contained in Indian Standard Water Meters (Domestic Type) Specifications being No. IS 779:1994 (hereafter called "the 1994 Standards"). The methods of testing performance requirement of water meters covered by the 1994 standards have been prescribed in the Indian Standard METHOD FOR PERFORMANCE TESTING OF WATER METERS (DOMESTIC TYPE) being No. IS 6784 : 1996 (hereafter called "Performance Standards 1996").

3. Initially in 1987 the predecessor of DJB by its circular approved procurement of only 8 approved make water meters, which were marked by the ISI, while sanctioning new water connections or replacement of defective, private meters. On 3.10.1994, due to a felt shortage of water meters a condition imposed by its previous circular of 1987 was suspended. On 23.8.2001, the DJB issued a circular in effect reviving its condition that only those water meters bearing the ISI Mark could be installed. This was followed by circular of 5.11.2001 which stated that till completion of process of formalities, the consumers could purchase, on a purely temporary basis (as stop gap arrangement) use of any ISI Mark dry dial type water meters manufactured as per BIS specification accompanied by a copy of a valid certification mark licence.

4. In supersession of its previous circulars the DJB notified on 13.11.2002 the

specifications applicable for use of 15 mm size private water meters for new water connections as well as for replacement of defective water meters. The specification for the meter was prescribed to be 15 mm size, Class 'B' Multi-jet, Magnetically coupled, inferential type with dry dial ISI Marked conforming to IS 779 (1994) with up-to-date amendments. This circular in addition spelt out the following conditions:

> *" Each and every meter shall be accompanied by a test certificate of testing as per above specifications by any of the following agencies alongwith the Manufacturers usual test certificate and Guarantee Card:-*
>
> *(1) M/S National Physical Laboratory, Dr. K.S. Krishnan Marg, New Delhi*
>
> *(2) M/s. F.C.R.I., Palghat, Kerala*
>
> *(3) M/S S.G.S. India Private Ltd., 250, Udyog Vihar, Phase-IV, Gurgaon-122015*
>
> *(4) Central Water Meter Workshop, Delhi Jal Board, Greater Kailash-I, New Delhi."*

5. This notification was followed with a notice published in the Times of India on 4.8.2003. The Public Notice reiterated the above condition in addition to the specification concern, namely, ISI Mark confirming to IS:779(94).

6. After the Public Notice, another circular was issued by the DJB on 8.9.2003. This stated, *inter alia,* that the certificate issued by any recognized testing laboratory to the manufacturer showing that the particular make/brand of water meter was in conformity with the prescribed specification, sufficed for the purpose of purchase of such meters by the consumers. In other words, the additional requirement spelt out in the circular dated 13.11.2002 and Public Notice 4.8.2003 were dispensed with.

7. On 14.1.2004, the DJB issued yet another circular; this time re-stated/reinstated the additional requirement. Further it stated that all Zonal Engineers

and Zonal Officials were to ensure compliance of the instructions; no meter without testing certificates by the four agencies mentioned in the first circular of 13.12.2002, (which was reiterated in the last circular of 14.1.2004) could be permitted to be installed.

8. As a sequel to these circulars in June-July 2004 the DJB issued notice inviting tender dated 10.6.2004 and a document entitled "expression of interest for the supply, installation and maintenance of domestic water meters" proposing to procure water meters from the manufacturers.

9. The writ petitioners impugn the additional condition embodied in the requirement that every meter should be accompanied by its certificate of testing by the four agencies mentioned in the circular dated 14.1.2004. It is stated that the specifications for the water meters have been spelt out in accordance with provisions of the Act, namely, the BIS Act of 1986. The concerned manufacturers like the petitioners have been certified by the BIS; their processes have been approved. The standards of performance required to be adhered and followed for testing are in turn prescribed by the performance regulations of 1996. Thus, when a manufacturer such as the petitioner offers its products in the market, it is with the authority of the ISI Mark, legitimately entitled to be used. The imposition of an additional condition of further testing and a certification by some other laboratory, for an additional fee, defeats the purpose of the Act and is, therefore, unlawful and arbitrary.

10. The petitioners allege that the requirement of a manufacturer holding a valid licence issued by the Institution of Standards, and having to use the ISI Mark in conformity with BIS Regulations serves the public interest and the basic objectives which

also underlie the circulars. It is contended that imposition of a further additional test would only add to the cost and not the quality of the meter. The petitioners aver that if such conditions are permitted, yet another circular can be issued requiring completely unnecessary testing in addition to the further testing. The circular is also attacked on the ground that although three agencies specified are Public/Government Agencies but the fourth viz S.G.S. India Pvt. Ltd. is a private laboratory and no rationale has been offered why such private party for additional testing is required as a condition of procurement or even installation of meters which bear the ISI mark according to the BIS Act.

11. It is claimed that the impugned condition of second testing is arbitrary and unreasonable and violates the petitioners' right to carry on their trade or business in an unhindered manner. The condition is not a reasonable restriction since it would fuel the costs of the meters. According to the petitioners, the second testing by any of the three Government Agencies would result in the cost of each meter working out between Rs. 3000/- to Rs. 5000/- whereas the actual cost of the domestic meter is only Rs. 375/-. It is also averred that the private agency, namely, S.G.S. India Private Ltd., a private laboratory, does not have any laboratory of its own. The petitioners further alleged that the charges collected by the National Physical Laboratory for testing one water meter is Rs. 5800/-. The other agency, namely, F.C.R.I. is located at Kerala and also charging similar fees for testing. Therefore, the second testing would entail delay and considerable expenses rendering reasonably priced water meters which are otherwise permitted to bearing the ISI mark monetarily unfeasible.

12. This Court by an interim order initially stayed the operation of the

impugned requirement on 5.10.2004. Later, after hearing an application moved by the DJB, the interim order was varied. The DJB was permitted to carry out condition strictly in accordance with the circular dated 25.6.2004 which had stated the testing would be by two agencies, namely, National Physical Laboratory, New Delhi and F.C.R.I. Palghat, Kerala. This order was made till the final out come of the proceedings.

13. The stated position of the DJB, reflected in its detailed averment contained in an application for vacation of stay and further pleading is that the impugned a requirement was necessary because it had received feedback from its workers/employees that most of the meters, even those with the ISI mark, were not performing correctly. According to it, though manufacturers are approved by the BIS, each and every meter manufactured by them are not in conformity with the prescribed standards. In this respect DJB invited suggestions from various water meter manufactures, as to how, the quality of every meter could be ensured. The DJB avers that as long as, manufacturers are selling meters directly in the open market, they would be responsible for sale of any sub-standard meters. However, for meters purchased by the consumer through DJB, it becomes the responsibility of the latter to ensure that such meters supplied are of right quality. In case of any defect in the meters, the consumer would hold the respondent liable for the defect. In these circumstances the DJB decided that every meter should be checked by an independent agency at the cost of the manufacturers, so as to ensure strict compliance of standards. Both the test laboratories i.e. M/s National Physical Laboratory, New Delhi and M/s F.C.R.I., Palghat, Kerala charge Rs. 55,000/- for a package of three meters and also require approximately 40 days for carrying out the said test. For them, it is difficult

to carry out tests at the manufacturing unit in respect of every meter, whereas, an independent testing agency being S.G.S. India Pvt. Ltd. is a world renowned testing laboratory having more than 1000 labs all over the world. Testing by such an agency of repute with several branches in India, would actually benefit public interest as it would address quality concern and also not impose a heavy burden or cost. For these reasons, the respondent decided to impose the additional condition on manufacturers, pre-qualifying them to obtain test certificates. However, after being qualified, every meter was to be certified by an independent agency being M/s S.G.S. Pvt. Ltd., so that a guarantee card could be given, along with, every meter to the consumer and the latter is free from any trouble at least for a period of two years.

14. In the course of the proceedings, the Bureau of Indian Standards (BIS) was impleaded as third respondent. In its affidavit it confirmed that the petitioners are licensees and maintaining the prescribed standards. According to the BIS no complaint was received against them. However, it is also averred that issuance of licence is by itself not guarantee that the product with ISI Mark is proper, unless the manufacturer comes on its production properly. The marking of water meters manufactured by the petitioners under the BIS certificate mark scheme, it is averred, is done after strictly following IS 779:1994 standard. The manufacturer is granted licence initially for one year in respect of each article, produced in its factory. The BIS carries out inspection of the manufacturing and testing capability located in the factory premises for the relevant period, draws samples from a batch of the production of the items, tests them in an independent laboratory, where the complete manufacturing and testing facilities are

available. Subject to conformity of the samples to the relevant standard, BIS also carries out surprise periodic inspection of the licensee factory to ascertain continued implementation of the standards as well as collect samples from the market including consumers and organizations such as DJB. Further BIS inspects periodic performance of the licensee and if the operation of the standards of testing and inspection are not satisfactory, suitable action is taken.

15. The BIS has averred that it has no provision for commercial testing of any item and that it only tests products. It asserts inability to extend its testing facilities to any other person who has not applied for licence from BIS. It is further averred that BIS does not provide facilities to anyone to carry out thorough testing of each & every item manufactured by its licensee. According to the provisions of 1986 Act, if violations are reported, BIS can commission a search and seizure operation besides taking remedial act of suspending the licence or cancelling it. It can also prosecute the offending licensee.

16. Sh. Sanjay Sherawat, learned counsel contended that in terms of the scheme of the Constitution, particularly, the various Entries in the Lists to the VIIth Schedule in the Constitution such as Entry 50 List-I, Entry 29 List-II and Entry 33-A of List-III, Parliamentary legislation on the issue of standards of weights and measures, have an overriding effect over any other legislation. Thus, even though Entry 17 of List-II enables the State to legislate on the subject of water, such legislation would be subjected to and necessarily yield, to provisions in the Parliamentary legislation on questions relating to standards. It was submitted that in the event of any repugnancy or conflict the law made by Parliament would override provisions of State legislation. It was contended

that in this background the provisions of the BIS Act, and the 1994 standards as well as the 1996 performance standards were conclusive. The petitioners' concerns products being lawfully marked by the BIS in terms of the Act and its specifications cannot be subjected to further testing. Learned counsel contended that none of the provisions in the Delhi Water Board Act 1998 by which the DJB was constituted enable testing of water meters; they do not authorize the DJB in any manner to impose additional conditions in regard to the quality of water meters marked under the BIS Act.

17. It was next contended by learned counsel that the requirement having to undergo additional testing is an arbitrary and unwarranted condition. He relied upon the decisions reported as *Mahendra Labs Private Limited vs. State of Karnataka and Ors.*, AIR 1987 Karn 166 where a tender condition regarding imposition of three years manufacturing experience was held to be unlawful as it excluded participation by a licensee under the Drugs and Cosmetics Act who was entitled to sell his products. Learned counsel also relied upon the decision reported as *Gharda Chemicals Limited vs. Central Warehousing Corporation,* 118(2005) DLT 159 where a Division Bench of this Court held that inclusion of requirement of three years manufacturing experience of an ISI marked chemical manufacturing licensee was irrational and arbitrary. Learned counsel relied upon the judgment of this Court reported as *Anil Kumar Gupta vs. Municipal Corporation of Delhi and Ors.*, 113(2004) DLT 3 and submitted that standards prescribed by the BIS cannot be overridden or ignored by insistence on certain additional or fresh conditions. In that case, the Municipal Corporation of Delhi (MCD) had insisted upon the grant of licence for use of premises for purposes of water packaging plant. The

Court had held that having regard to the nature of the process and the licence granted by the BIS to the petitioner, packaged drinking water could not fall within the term aerated water.

18. Learned counsel next contended that the insistence on testing, prescribed by the impugned circulars amounted to unreasonable restrictions on the right to carry on trade or business guaranteed under Article 19(1)(g). It was contended that every citizen is entitled to uninhibited right to carry on a business vocation or trade and that restrictions to such right can be imposed only on stated grounds, and in public interest. The requirement of testing unreasonably impacted on the petitioner's right to trade. Its products were manufactured admittedly in confirmity with Parliamentary legislation. Yet, they were subjected to testing by an outside agency. Learned counsel relied on the decision reported as *Pathumma and Ors. vs. State of Kerala and Ors.*, AIR 1978 SC 771; *Kharak Singh vs. State of U.P.*, AIR 1963 SC 1295; *Mohd. Yasin vs. Town Area Committee*, AIR 1952 SC 115 and *S.L. Sachdev & Ors. vs. Union of India and Ors.*, AIR 1981 SC 411. Learned counsel lastly contended that once the petitioner was issued a licence in terms of BIS Act and the Rules, the latter containing an elaborate mechanism for inspection of quality and putting in place control system which included search and seizure proceedings, there was no rationale for insisting upon further testing by an unauthorised and unlicenced agency. It was contended that the various processes indicated in the rules which can be resorted to by the BIS included type testing, line testing, continuous testing of products and temperature test. All these were known as good manufacturing practices. It was contended that once the products including water

meters undergo such rigorous tests and procedure which are pre-conditions to their marketing, the further insistence of testing by a completely private agency whose credentials are unknown and were not disclosed to the Court, and whose testing for a few minutes for a fee is insisted upon, is not only contrary to the provisions of the BIS Act but an arbitrary condition. It was contended that such a condition betrays utter non-application of mind and is not founded on reason. Learned counsel submitted that even if it were assumed that the DJB as a public procuring agency had a concern and anxiety about the quality of meters, it had to necessarily address such concerns in a reasonable manner. The proper mode would have been to ask the BIS to make a suitable mechanism. In stead it unilaterally imposed such unwarranted conditions which cannot withstand the test of reason. All State action including action by instrumentalities of the State are to be founded on reason. The impugned notification and condition does not show any reason and are, therefore, irrational.

19. Mr. Sandeep Aggarwal, learned counsel for the DJB resisted the petition. Initially, he made an argument about the petitioner's inability to maintain the proceedings on account of suspension of their licence by the BIS. However, he later did not press the submission in view of the documents and materials suggestive of the BIS with drawing its objections. It was contended by counsel that in terms of Section 17 of the Delhi Water Board Act 1998, DJB has to provide meters to measure consumption of water by users. Learned counsel contended that the DJB in exercise of its powers under Section 75 had the authority to enter into contracts and it can make regulations under Section 109 to effectuate provisions of the Act. Learned counsel also relied upon Section 9(f) of the Act

which enables the DJB to provide for ancillary or incidental matters necessary to promote the object of the enactment. It was contended that on an overall conspectus of provisions of the Delhi Water Boards Act, the necessary inference is that DJB has legitimate concerns and, therefore, the power to ensure that water meters supplied by it conform to their description, perform as such and are of the desired standard and quality. Learned counsel contended that experience had shown to employees of DJB that a large number of water meters procured from private manufacturers though labeled with the BIS mark, were sub-standard. As long as the consumer purchased such meters directly from the market, he could take suitable action in case of defects in the products. However, where the DJB in exercise of its powers under Section 17 read with Section 75 procured such meters and supplies them to the consumers, it owed an obligation to them. It was in order to allay any such apprehensions that the conditions in the impugned notification were framed.

20. Learned counsel contended that under Rule 11 of the BIS Rules, agents can be appointed for the purpose of testing. Having regard to the experience in the field and the large number of complaints received the DJB formed the opinion that condition of testing by the concerned agencies should be insisted. It was submitted that the condition is neither unreasonable nor arbitrary and designed to achieve a public purpose. Learned counsel contended that the decision of the DJB, insisting upon the testing by the agencies is neither actuated by mala fides; admittedly such a pleading had not been made by the petitioner nor even proved. Further it is in the nature of a decision taken by an expert body and the Court should be circumspect in interfering with it in exercise of its power

under Article 226 of the Constitution of India.

21. Learned counsel relied upon the decisions of the Supreme Court reported as *Ugar Suggar Works vs. Delhi Administration*, 2001(3) SCC 635 and submitted that the courts do not ordinarily interfere with policy decisions of the executive unless they are faulted on ground of *mala fide*, unreasonableness, arbitrariness or unfairness. If the policy cannot be faulted on such grounds, the mere fact that it hurts the business interest of a party would not justify judicial intervention. Learned counsel relied upon the judgment of the Supreme Court reported as *Directorate of Education vs. Educomp Datamatics Ltd.*, 2004 (4) SCC 19 and submitted that the Court should be careful in interfering with tender conditions set by the State or its agencies since they are framed in exercise of undoubted power and to further public interest. He also relied upon the decision reported as *Chairman and M.D., B.P.L. Ltd. vs. S.P. Gururaja and Ors.*, 2003 (8) SCC 567.

22. Learned counsel for the BIS Sh. R.K. Tripathi submitted that in terms of the BIS Act, the Bureau had extensive powers to carry out testing for ensuring adherence to its standards. It was submitted that the BIS did not receive any complaints from consumers regarding the meters manufactured and marketed by the petitioners. He further submitted that the BIS does not provide facilities to anyone to carry out thorough testing of each item manufactured by its licensees.

23. Pleadings and contentions of parties give rise to the following questions for decisions by the Court:

1. Whether DJB has the competence and authority of the DJB to insist on additional testing and inspection of water meters and whether such conditions are contrary to the BIS Act and standards framed by it;
2. Whether the impugned notification is arbitrary.

QUESTION NO. 1

24. A look at the provisions of the BIS Act show that it meant to be a comprehensive legislation for the setting up of a specialised expert body in regard to formulation of standards, certification of quality of various products and enforcement of such standards through various methods including penal action. There is no doubt that the BIS, a successor to the Indian Standards Inspection, was set up pursuant to Parliamentary intention to have uniformity in standards for products and processes. In terms of the Act, the BIS is constituted as a statutory, autonomous body. It charged that the duty of the spelling out standards in regard to both the processes of productions as well as products. It has regulation framing powers and further to its duties, standards in regard to the various goods, services and processes have been notified.

25. The main objection of the petitioner is that once its processes are certified to be in accordance with the BIS standards and performance norms and it is allowed to affix the ISI/BIS mark, the requirement of additional inspection or testing for any purpose, for individual products would violate provisions of the BIS Act. This argument is premised on two limbs. The first limb is that the DJB cannot invoke any power under the Constitution since the legislative field has been occupied by the Parliament which enacted the BIS Act in 1986. In such case, the DJB cannot prescribe a rival set of standards.

Reliance has been placed upon Section 10 of the BIS Act which provides for function of the BIS, Section 11 which prohibits the improper use of standard mark etc. The petitioner also relied upon enforcement powers under Section 25 and 26 of the BIS Act which enable inspecting officers to make surprise inspections and take coercive action. Further reliance has been placed upon Section 33 which prescribes penalty for improper use of standard mark. It was also contended that in terms of Bureau of Indian Standards Rules, particularly, Rules 10, 11 and 12, the licensees are permitted to affix the authorized mark on the products only after the BIS is satisfied that its processes are in conformity with the prescribed standards. In the absence of any similar elaborate mechanism or a more detailed specific processes regarding water meters by the Delhi Water Boards Act, the contention that the DJB cannot insist on additional tests of the BIS marked water meters of the petitioners. An important part of this argument is the contention that the impugned testing requirement, does not have statutory sanction and is violative of the BIS Acts, Rules and Standards in question.

26. The second limb of these submissions is that the DJB does not have any authority under the Delhi Water Boards Act to the insist on additional testing and the obligation (to supply water meters) if any under Section 17 of the said Act is not mandatory but only optional.

27. The provisions of the BIS Act undoubtedly lend support to the submissions that it is a complete code in itself and to the extent specific rules and standards have been prescribed regarding production processes, inspection, testing and enforcement, there cannot be any other mode or method obliging manufacturers to undergo something more

by way of standards. The petitioners' submissions would have been attractive if the DJB were to insist that regardless of the ISI standard or mark, the water meters in question would have to conform to some other standards prescribed by it or would have to undergo some other form of testing, inspection and certification, rivaling or claiming to be better than the BIS standard. That, however, is not the case. The DJB here is accepting the standard laid down by the BIS—it also recognizes that the petitioner is a licensee of the BIS and is bound by the standards prescribed under the BIS Acts and Rules. The impugned notification is, however, insisting the additional procedure of testing—what is characterized as commercial testing because the DJB's claim is that being a supplier of procured products, and an instrumentality of the State, it is in public interest concern to ensure that each water meter performs as required, namely, recording the consumption accurately. The claim of the petitioners here is not in the context of licensing or their right to manufacture. That is not disputed by the DJB; in fact the BIS has admitted that it is a licensee. The additional testing, therefore, is projected as an impediment to its free trade with the DJB.

28. In this case, the question of BIS standards being rival or in any manner questioned or its enforcement processes being disputed do not arise. The DJB's concern to ensure that the water meters procured and supplied by it perform as water meters is well within the scope of its power under Section 75 of the Act read with Section 17. It is, no doubt, true that the DJB is under no compulsion to supply water meters but if it chooses to do so it not only should supply proper water meters but is also under an obligation to ensure that they are of the desired quality. Anything less would entail action

against the DJB. In these circumstances, the inclusion of an additional condition of testing in the facts of this case cannot be termed as beyond the competence and jurisdiction of the DJB or violative of the provisions of the BIS Acts and Rules.

REGARDING QUESTION NO. 2

29. What has emerged from the factual matrix is that the two official laboratories which apparently have sanction under the BIS Act, Rules and the Standards as agencies nominated for testing water meters, take unduly long time, i.e. about 4-6 weeks in performing their task. They also charge a huge amount. It is an admitted fact that such testing would entail additional expenditure working out to approximately Rs. 6,000/- for each meter. The third agency, M/s. SGS Pvt. Ltd. however charges much lower amount for inspection and certification. No supporting material has been shown to the Court as to its acclaimed credentials or experience in this field. It is also not denied that SGS is not one of the agents nominated under the BIS Acts and Rules as a licensee, authorized to undertake testing of the products.

30. In the light of the above facts, the question is whether the imposition of the additional requirement is arbitrary and unreasonable. In answer to the first question formulated it was held that the DJB was within its powers under the Act to require additional test to water meters.

31. The State, its instrumentalities and public agencies, like any other concern have the right to stipulate suitable conditions while entering into contracts and disposing of public property. Yet, the special character of such State/public agencies and Constitutional imperatives, particularly, Article 14 require that the stipulations should be

non-arbitrary equal in operation and the process of contract awarding, fair and reasonable. This has been spelt out in numerous decisions of the Supreme Court including in *Tata Cellular vs. Union of India*, 1994 (6) SCC 651, *Sterling Computers Ltd. vs. M&N Publications Ltd. & Ors.,* 1993 1 SCC 445; *Union of India Vs. Dinesh Engineering Corporation*, 2001 (8) SCC 491, *Air India Ltd. Vs. Cochin International Airport Limited*, 2000(2) SCC 617 etc. The Courts have repeatedly held that Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor according to its will and pleasure. It has to act reasonably, fairly and in public interest while awarding contracts. The Courts have ruled that at the same time no person can claim a Fundamental Right to carry on business with the States or its agencies. All that he can claim is that while competing for the contract he should not be unfairly dealt with or discriminated, to the detriment of public interest.

32. In this case, the question is whether the imposition of tender condition requiring additional testing by any of the three named agencies is arbitrary or unreasonable. The petitioners assert that such conditions are arbitrary and have no rationale; they also complaint that the conditions unreasonably restrict the right to carry on trade and business guaranteed by Article 19(1) (g) of the Constitution. The DJB on the other hand asserts that the condition is necessary and has been imposed in public interest. It is contended that the impugned requirement is the product of a policy decision of an expert body and the Court should be circumspect in disturbing it.

33. The two decisions cited by the petitioners, namely, *Mahendra Labs Pvt. Ltd.* of the Karnataka High Court and the *Gharda Chemicals Limited* of a Division

Bench of this Court no doubt interdicted the stipulations in tender conditions. The question, however, is whether in the facts of this case the condition for additional testing are arbitrary in the sense that they unfairly exclude the petitioners.

34. The Supreme Court in its decision reported as *Association of Registration Plates vs. Union of India and Ors.* (2005) 1 SCC 679 had to decide on the challenge to a tender condition that the bidder or promoter should have sufficient experience in the field and should have worked in at least five countries for production of licence plate, (which were sought to be procured) and should have worked at least in countries with licence place having security features world wide. A condition of minimum of annual turn over of Rs. 30 crores in the year immediately preceding the bid, of which 25% should have been from the licence plate business had also been mandated. The Court held that in the matter of tender condition formulations great latitude had to be conceded to the State authorities or agencies concerned; unless the action was found to be malicious and in misuse of its powers such tender conditions were held to be unassailable. The Court held that such conditions did not violate the equality clause under Article 14 or encroach the Fundamental Rights of the class of intending tenderers under Article 19 (1)(g) of the Constitution.

35. In this case, the condition of additional testing has been insisted upon in relation to all manufacturers who intend to supply to the DJB. It applies equally, regardless of the fact that such suppliers and manufacturers to all licensees of the BIS who have to conform to its standards. No material has been shown to the Court indicative of malice in law or bias against the petitioners. In these circumstances, the

charge of the conditions requiring such additional testing being arbitrary as violative of Article 14 has to fail.

36. The last limb of arbitrariness set up by the petitioners in the proceedings was that inclusion of M/s. SGS India Pvt. Ltd. an unlicensed private agency whose credentials are unknown, vitiates the notification and amounts to non-application of mind. It was also claimed that such a condition is not founded on reason.

37. The factual narrative shows that SGS India Private Ltd. was included as one of the testing agencies for the first time on 13.11.2002. For a brief while this condition was suspended but later re-introduced on 14.1.2004. While the concern of DJB to ensure that water meters procured by it and supplied to the consumers conform to the quality and the necessity of visual inspection and same form of testing cannot be denied, the rationale for including a private agency and (an unlicensed one at that), to inspect and certify water meters, has not been disclosed. In terms of Rule 11 of the BIS Rules 1987, BIS can appoint any person or organisation in India or outside India as its agent for discharging any of the functions such as carrying out inspection in the manufacturers premises, or test samples of productions for conformity with the Indian Standards and inspect consignments intended to be covered by the standard mark. The BIS has asserted in this case that it cannot test individual products of its licensees. In such an event, if indeed the DJB was so minded to ensure individual testing of the water meters logically it should ensure that such testing or visual inspection to its satisfaction is carried out through its own agency or officials. In stead, it "out sourced" it to the SGS India, which is not an agent of the BIS under the rules. Had such condition related to a private agency with the

unimpeachable credentials and which was an agent under Rule 11, there could have been no difficulty. However, neither is the case. No materials were disclosed about the expertise of the SGS India Private Ltd., although DJB asserted about its experience in the field.

38. It is well settled that all decisions of the State have to be founded on reason which is also a facet of fairness and non-arbitrariness. It is not as if reasons in such cases have to be elaborate or even disclosed to the concerned parties. Yet, the obligation of the State agency to act on the basis of reasons which can be justified, is an integral part of the Constitutional set up. In this case, the DJB's rationale for including SGS India Private Ltd. as a testing agency has not been disclosed.

39. In view of the above finding, the petition has to partly succeed. The condition in the impugned notification requiring additional testing of the water meters by the SGS India Private Ltd. is hereby quashed. It is made clear that this judgments does not preclude the DJB from insisting on testing by inspecting the water meters itself at the stage of acceptance or insisting that at the stage of pre-tendering they should be tested by official agencies and/or agencies under Rule 11 of the Bureau of Indian Standards Rules 1987.

40. The petition is allowed to the above extent. No costs.

July 2, 2007 **S.RAVINDRA BHAT**
JUDGE